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# Insurance Coverage for Damages for Emotional Distress in Montana

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# INSURANCE CONSUMER COUNSEL'S COLUMN

## INSURANCE COVERAGE FOR DAMAGES FOR EMOTIONAL DISTRESS IN MONTANA

BY PROFESSOR GREG MUNRO

*"Emotional distress passes under various names such as mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry. However, it is only when emotional distress is extreme that possible liability arises."*

**Roberts v. Saylor**, (Kansas 1981)<sup>1</sup>

### Introduction

Society has become more aware of the mind-body connection. We have long recognized that severe injury to a person's body may cause measurable limits on strength, endurance, and range of motion and produce pain. Tort law has taken cognizance of these physical manifestations of injuries to the person because they are considered observable, verifiable, and therefore, real. At the least, the civil justice system has recognized that such physical manifestations cost money to remedy and cause a person to lose work so they constitute measurable damages of pecuniary import appropriate for jury consideration.

The same system has been much slower in recognizing damages to the mind suffered by victims of torts, especially injury to the mind caused by watching loved ones get maimed or killed. Today, we know that not only does severe injury to the body cause injury to the mind, but that witnessing catastrophic injury to a loved one or the physical effects of such injury to a loved one likely causes the same mental damage. Therapists who treat patients now recognize the unique debilitating effects of such resulting maladies as post-traumatic stress disorder and emotional distress. They understand the import of symptoms such as

memory loss, anxiety, depression, mental preoccupation, tearfulness, personality change, and compulsivity, and appreciate their significance in diagnosing emotional distress and other trauma-related disorders of the mind. Modern medicine recognizes the intricate interrelationship between the health of the body and that of the mind.

Hence, the standard of care for plaintiffs' counsel is to identify emotional distress not only in the physically injured plaintiff but in family members who may be suffering. Family members must be carefully assessed for psychological or emotional injury to develop effective proof of the injury as a recoverable damage for purposes of negotiation and trial. However, recovering damages for emotional distress requires that the law recognize as compensable the particular form of emotional distress suffered by the client. In many cases, recovery also requires that the insurance policy providing coverage for the claim involving emotional distress recognizes emotional distress as a covered damage.

This article has the twin purposes of exploring the circumstances in which Montana tort law recognizes emotional distress as compensable and examining the problem of securing insurance coverage of emotional distress damages. Techniques for

investigation and proof of emotional distress damages must be left to other sources. As in many other areas, the law here is best understood by looking at the relevant line of cases and statutes in their historical context.

### History of the development of "emotional distress" in Montana

In England, in 1808, Lord Ellenborough held that, at common law, there could be no recovery for the wrongful death of a person.<sup>2</sup> Parliament eventually sought to address the harshness of the rule by enacting Lord Campbell's Act which provided an action for wrongful death.<sup>3</sup> The act provided for jury determination of damages as follows:

...[A]nd in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought...

However, Lord Campbell's Act was construed by the Queen's Bench in 1852 to refuse recovery for mental anguish in a wrongful death action.<sup>4</sup> The court said that the purpose of the Act was compensating families of those killed and not "solacing their wounded feelings." Hence, the Queen's Bench found it error for the trial court to have instructed that the jury, in addition to compensation for loss of support, could compensate a widow for her emotional pain. The court reasoned that a jury could not find some pecuniary measure for the damage so as to make it too difficult to determine.

The rule that, in a wrongful death action, one could not be compensated for emotional pain became known as the "English rule" and was followed by most American jurisdictions.<sup>5</sup> In Montana, the rule was relegated to history by the Supreme Court in 1983 in **Dawson v. Hill & Hill Truck Lines** at the urging of the late John Hoyt. Hoyt represented a couple whose 17-year-old son was a high school superstar slated to be valedictorian of his class in May of 1982. He was killed when a driver for Hill & Hill Truck Lines attempted to pass two cars during a snowstorm near Belt, Montana. The truck collided head-on with another oncoming semi, and the careening trucks struck the car in which Dawson's son rode, killing him.

At that time, Montana permitted recovery for loss of society and companionship but imposed a pecuniary loss rule allowing those losses only to the extent that they had a pecuniary value.<sup>6</sup> The question Hoyt posed was: "Are damages for the sorrow, mental distress or grief of the parents of a deceased minor recoverable in a wrongful death action brought pursuant to section 27-1-512, MCA, 1979?" (Montana's wrongful death statute.) The court, in holding that "damages for the sorrow, mental distress or grief of the parents of a deceased minor are recoverable," retired the English rule and overruled "[a]ny previous Montana decisions, to the extent they conflict with this holding."

#### Emotional distress of the "bystander"

The same day that **Dawson v. Hill** was decided, the Montana court followed the landmark California case of **Dillon v. Legg**,<sup>7</sup> in recognizing for the first time a cause of action for negligent infliction of mental and emotional distress. In **Versland v. Caron Transport**,<sup>8</sup> Bert Versland was driving a hay bailer wagon on a

highway near Big Timber, Montana, when a semi-truck driver negligently collided with Versland causing his death. Versland's wife, Sharon, witnessed part of the collision and then saw her husband's body at the collision scene. She sought to recover for negligent infliction of emotional trauma caused by witnessing the collision that caused her husband's death.

**Dillon** represented the latest advance in recovery for bystanders. Prior decisions had required first that the bystander herself suffer some physical impact, and later, that the bystander at least be in the "zone of danger" before she could recover for emotional distress. The Montana Supreme Court in **Versland** followed **Dillon** in rejecting both limitations and allowing recovery if it was reasonably foreseeable that defendant's conduct which causes injury or death to a family member would cause mental distress to another family member who witnessed the accident. The court considered the **Dillon** factors to determine whether emotional distress would be considered foreseeable so as to invoke a duty of care to the bystander and ultimately adopted its own three factors:

- 1) The shock must result from a direct emotional impact upon plaintiff from the sensory and contemporaneous perception of the accident, as contrasted with learning of the accident from others after its occurrence.
- 2) The plaintiff and victim must be closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.
- 3) Either death or serious physical injury to the victim must have occurred as a result of defendant's negligence.

Importantly, **Versland** held that physical manifestations of emotional

trauma would not be required to support a *prima facie* case for negligent infliction of emotional distress.

#### The problem with **Versland**

Unfortunately, the corollary to **Versland** was that the family member who was not present at the scene could not recover. The 1992 case of **Maguire v. State of Montana**<sup>9</sup> illustrated that category of cases in which the **Dillon/Versland** tests would deny recovery to one who clearly suffered emotional distress. Mrs. Maguire had an autistic and severely retarded daughter who could not communicate. At age four, she placed her in the Montana Development Center, an institution run by the State of Montana. When the daughter was an adult, her caregiver at the MDC raped and impregnated her. The elder Mrs. Maguire had to deal with a number of difficult issues of the pregnancy, including: 1) whether the baby would suffer the same diseases as its mother; 2) whether to have the baby aborted in spite of her Catholic religion; 3) whether to raise the baby or place it for adoption; and 4) whether her daughter was safe. Undoubtedly, Mrs. Maguire suffered greatly from stress and depression and the resulting symptoms of which she complained like trouble sleeping, nightmares, contemplation of suicide, and generally feeling run down. She required multiple visits to her doctor and a psychologist.

The question facing the court in **Maguire** was whether Mrs. Maguire could maintain an action in court for her emotional distress. Though she manifested very substantial mental and perhaps even physical injury, the court found she could not meet **Versland's** "presence requirement" that "the shock must result from a direct emotional impact upon plaintiff from the sensory and contemporaneous perception of the accident as contrasted with learning of the accident from others after its occur-

rence." Nor could she meet the presence requirement of Restatement of Torts § 46 (2) which provides for recovery for injury to a claimant for extreme and outrageous conduct directed at a third person:

- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress:
- (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
  - (b) to any other person *who is present at the time*, if such distress results in bodily harm.

The court noted that it had allowed recovery of emotional distress damages without physical injury in *Johnson v. Supersave* and *Niles v. Big Sky Eyewear*,<sup>10</sup> but pointed out that, in both cases, the victim was not a third party. Either the conduct had to be directed at Maguire or Maguire had to be present regardless of the causal connection between the defendant's conduct and Mrs. Maguire's resulting injury. Recovery was denied.

#### Emotional distress of the claimant absent a showing of physical or mental injury

*Johnson v. Supersave*,<sup>11</sup> was decided shortly after *Versland* and represented another category of emotional distress claims – those involving no physical or mental injury. Johnson was arrested and jailed on a bad-check warrant although he had made complete restitution on the check six months before his arrest. Supersave had failed to tell its collection agency, which filed the bad check complaint with the county attorney's office, that the check had been made good.

The jury found Supersave negligent and awarded \$17,000 in damages for emotional distress. At trial, Johnson proved no physical injury or mental injury, so that the question was "Whether emotional distress damages are proper in a negligence action absent finding of injury." The Johnson court noted that in *Versland* they rejected any requirement that some physical manifestation must be present to support a "*prima facie* case for negligent infliction of emotional distress." They further noted that there is a difference between injury and distress, confirming that where there is "either a psychic or physical injury causally related to the incident in question there is compensability." The court said, "Here we have no testimony supporting injury. We must decide whether to allow compensation for mental distress absent injury and, if so, under what circumstances." The decision states:

This court adopts the species of case approach which requires a factual analysis of each case to determine whether the alleged "emotional distress" merits compensation. In determining whether the distress is compensable absent a showing of physical or mental injury, we will look to whether tortious conduct results in a *substantial* invasion of a legally protected interest and causes a *significant* impact upon the person of plaintiff.

In *Johnson*, the court found liberty to be the right substantially invaded and held it proper for the jury to award Johnson damages for emotional distress.

*Johnson* was followed in 1989 by *First Bank (N.A.)-Billings v. Clark*,<sup>12</sup> a bank bad faith case in which the court held that the trial court erred in instructing the jury

about damages for emotional distress because the claimant failed to introduce any evidence of damage from the emotional distress. Quoting *Johnson*, the court required "some proof that plaintiff's tortious conduct resulted in 'a substantial invasion of a legally protected interest and . . . [caused] a significant impact on the person.'"

Of particular importance is the fact that the court found the necessary legally protected interest to be "the interest in freedom from emotional distress." However, the court noted that "the cause of action arises only if the invasion of this interest is substantial and the impact significant," adopting comment (b) of the Restatement (Second) of Torts § 46 (1965) which is quoted in the opinion:

Emotional distress passes under various names such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity . . . The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exagger-

ated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge . . . It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.

At trial, Clark alleged only that he "felt bad, lost sleep, and became withdrawn" as a result of the Bank's conduct. The court said its adoption of the Restatement comment was "only a new interpretation of the existing 'significant impact' requirement" in refusing to remand for a new trial on emotional distress.

#### Recognition of the tort of emotional distress

In 1995, recognizing that the law of emotional distress had become a complex patchwork in which the exceptions had eaten the rules, the court set out to simplify the area by recognizing the torts of negligent and intentional infliction of emotional distress in *Sacco v. High Country Independent Press, Inc.*<sup>13</sup> When Diane Poynter Sacco, a photographer and reporter for the High Country Independent Press at Belgrade, Montana, quit her employment, her employer accused her of stealing photographic negatives and proof sheets and filed criminal charges against her. When the criminal proceedings were ultimately dismissed, Sacco brought a civil action against the principals of HCIP and the police officer involved alleging malicious prosecution, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil rights violations. All five counts were dismissed on motions for summary judgment, resulting in an appeal to the Montana Supreme Court. Hence, the court was pre-

sented with the issue of whether Montana would recognize causes of action for intentional and negligent infliction of emotional distress. Until that time, emotional distress was recognized primarily as a "parasitic" damage to a host cause of action, the traditional rule having been that there could be no recovery for the negligent infliction of mental distress alone.<sup>14</sup>

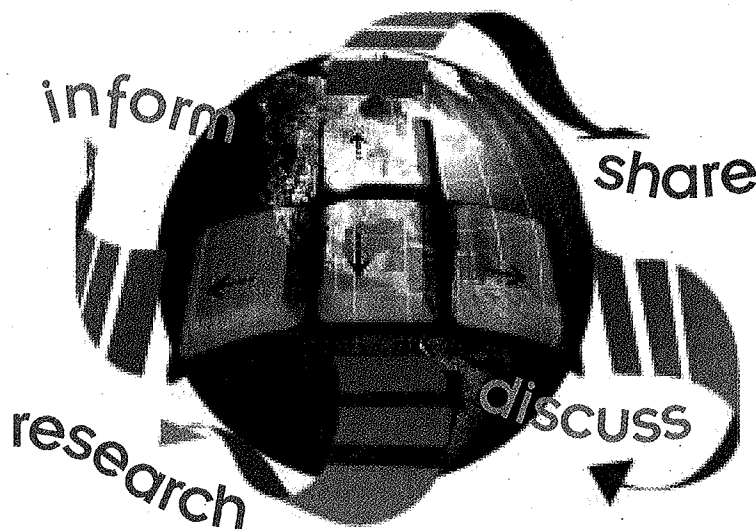
However, the court took the

occasion to recognize the tort of negligent infliction of emotional distress in Montana:

Therefore, we adopt the following standard for determining whether a plaintiff has demonstrated a cause of action for the negligent infliction of emotional distress. A cause of action for negligent infliction of emotional distress will

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arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent act or omission.

The court emphasized repeatedly that the standard required 1) proving that the emotional distress suffered was severe or serious, and 2) that the emotional distress was the reasonably foreseeable consequence of the defendant's negligent act or omission. The court cited Restatement (Second) of Torts<sup>15</sup> for the role of judge and jury in determining emotional distress:

It is for the court to determine whether on the evidence severe [serious] emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.

Again, the court defined "serious" or "severe" emotional distress by quoting Restatement (Second) of Torts, § 46, comment (j) at 77-78 (quoted above).

The court then conceded on review that it had tacitly approved

intentional infliction of emotional distress as a separate cause of action in three cases<sup>16</sup> and therefore proceeded to state a new cause of action for intentional infliction of emotional distress. In so doing, it abandoned the former requirement that the damage of emotional distress be appendant to "outrageous" conduct.

... an independent cause of action for intentional infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission.

The court reiterated that damages for emotional distress are compensatory and not punitive but concluded:

We conclude that an award of punitive damages is the proper method of addressing the culpability and intentional nature of the defendant's conduct in an intentional infliction of emotional distress case.

In essence, the elements of the two torts are the same, the only difference being in the culpability of defendant's conduct which may result in punitive damages being awarded under MCA § 27-1-220 in addition to the damage for emotional distress. **Sacco** was intended to simplify and modernize the rules with regard to recovery of damages for emotional distress. Hurdles such as the bystander requirements of **Versland**, the "substantial invasion of a legally protected interest" of **Johnson**, and the "outrageous" conduct requirement of **Maguire** all were relegated to the museum of past doctrines by the court in **Sacco**.

#### Triggering the "per accident" limits of insurance coverage with emotional distress

Tactically, the effort to obtain an adequate recovery for the injured party often involves an attempt to recover an additional limit of insurance essentially doubling the potential recovery of the clients in serious cases. The only way to obtain the "per accident" limit as opposed to the "per person" limit of auto insurance is to establish that another person has suffered an injury cognizable by the court as an independent cause of action. Otherwise, a parasitic damage suffered by a family member and appendant to the claim of the person who suffered bodily injury will not trigger a separate limit of insurance. For example, in **Bain v. Gleason**,<sup>17</sup> the court established that a spouse's loss of consortium claim is indeed a distinct and independent cause of action under tort law. However, the court held that the spouse's consortium claim is derivative of the bodily injury claim of the person suffering the direct physical injury.

The standard ISO language of insurance policies tends to define "Bodily Injury" as follows:



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"*Bodily Injury* means bodily injury, sickness, or disease, including death at any time resulting therefrom, sustained by a person."

The same forms define the injured person's "damages" to include the services of that person:

"*Damages* with respect to Coverage A [bodily injury Coverage] includes damages for care and loss of services."

Therefore, the court in *Bain* concluded that the spouse's consortium claim is included within the "each person" limitation on auto insurance coverage and does not trigger the additional or "per accident" limit:

"We therefore interpret the mandatory motor vehicle insurance statutes now in effect to mean that the cause of action for loss of consortium by the deprived spouse and the cause of action for bodily injuries by the injured spouse are subject together to the 'one person limitation' found in § 61-6-103, MCA, as referred to in § 61-6-301, MCA."

We should note, however, that whether consortium triggers an additional limit depends on the insurer's definition in the particular policy. For example, the court in *Bain* noted that an Allstate policy that defined bodily injury as "bodily injury, sickness, disease or death to a person, including *loss of services*" resulted in triggering additional coverage. Under that definition, the spouse suffering loss of consortium has suffered "bodily injury" so as to trigger the "per accident" limit of coverage.

Emotional distress of a family member of the physically injured victim is so important because it

presents the potential for recovering the additional limit of coverage. In *Treichel v. State Farm Mut. Auto. Ins. Co.*,<sup>18</sup> the Montana Supreme Court held that negligent infliction of emotional distress to a family member triggers the second or "per accident" limit of insurance.

In *Treichel*, the petitioner, Carolyn Treichel, had been riding bicycles with her husband on Old Montana Highway 200 near East Missoula, Montana, when she witnessed a car collide with her husband, inflicting a grievous head injury and causing his death. The parties agreed that she met all necessary elements of a cause of action for negligent infliction of emotional distress. The court refused State Farm's argument that her claim should be treated the same as *Bain's* claim for loss of consortium and considered derivative. Instead, the court held that Carolyn Treichel "was a second injured person in the accident" so that the "Each Accident" limits in the policy applied.

#### **Killing the risen specter of bystander requirements**

In *Treichel*, in the process of distinguishing the emotional distress claim in that case from the *Bain* loss of consortium claim, the court stated:

Unlike Carolyn, the plaintiff in *Bain* was not at the scene of the accident and did not witness the injuries to his spouse. \* \* \* Carolyn was a separate person who received an independent and direct injury at the accident scene. Her serious and severe emotional distress was the reasonably foreseeable consequence of Hintz's negligence.

On reading this language, defense counsel could not resist the position that the court, in *Treichel*, had reintroduced the contemporane-

ous impact requirement from *Versland*. Consequently, the issue was again injected in *Wages v. First National Ins. Co. of America*.<sup>19</sup> There, a child, Skylar Wages, was run over by a truck while roller-blading in front of his home. The father, Gerald Wages, was notified at work and went to the hospital. Skylar's serious injuries included pelvic fracture and complete urethral disruption which required four major invasive surgeries, physical therapy, and catheterization performed by his father three or four times each day. Ultimately, Gerald suffered extensive work loss, medical expense, and other financial obligations by reason of his care for Skylar. He filed his own claim for negligent infliction of emotional distress to which the defense took the position that he could not sustain an independent non-derivative claim for negligent infliction of emotional distress without having witnessed the accident so as to suffer some contemporaneous impact. However, the court rejected the position quoting *Treichel* in holding:

"[I]n clarifying the elements of a claim for negligent infliction of emotional distress in *Sacco*, we eliminated the other various sorts of theories by which independent torts of negligent infliction of emotional distress came into Montana law such as the *Versland* bystander analysis."

The court said that its language in *Treichel* was intended to support the distinction between NEID claims and loss of consortium claims. Nor did the court accept the position that one must be at the scene of the accident to be a foreseeable plaintiff saying, "In *Sacco* we severed the previously mandatory nexus between witnessing the accident and foreseeability, and established that a defendant can owe a duty to a NIED

claimant even in circumstances where the claimant was not at the scene of the accident." The court then set out guidelines for determining foreseeability in NEID cases:

For such a determination, the court may consider such factors as the closeness of the relationship between the plaintiff and victim, the age of the victim, and the severity of the injury of the victim, and any other factors bearing on the question. Moreover, the court may consider whether the plaintiff was a bystander to the accident. It may not, however, rely exclusively on the fact that a plaintiff was not a bystander to conclude that such a plaintiff is an unforeseeable plaintiff.

**Wages** appeared to establish that the law of emotional distress is that which is set out in **Sacco**, unencumbered by the theories and requirements that had vexed those representing injured persons during the development of emotional distress law.

Again, in *Henricksen v. State*,<sup>20</sup> the court confirmed that one is not required to be a bystander to recover damages for emotional distress suffered as a result of serious injury to a family member. There, a mother watched as her 3-year-old slipped through a stairway balustrade at the Montana State University library and fell head first 20 feet to the concrete floor below. Immediately after the accident, she learned that another child had fallen through the same stairway weeks earlier. Her position was that the knowledge of the earlier fall was a factor in causing her emotional distress (post-traumatic stress syndrome). The State's position was that she could not claim emotional distress damages caused by the earlier fall because there was no direct emo-

tional impact upon the plaintiff from the sensory and contemporaneous perception of the accident. However, the court cited **Sacco** and **Wages** for the proposition that one need not be a bystander to claim emotional distress damages. Being a bystander is a factor to be considered, but is not, by itself, determinative.

The court also found the trial court erred in concluding that the heightened standard of severe or serious distress required by **Sacco** only applied in cases where there is no physical or mental injury. The court clarified that emotional distress must always be severe or serious regardless of physical or mental manifestation. The court cited Restatement (Second) of Torts, § 46, comment k for the proposition that "[n]ormally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm, which *in itself* affords evidence that the distress is genuine and severe." The court said, "A jury instruction on emotional distress should state that the severe and serious standard applies and that this standard can be met by proof that emotional distress resulted in shock, illness, or other bodily harm."

#### Getting insurance to cover the tort

Exuberance over the development and clarification of emotional distress law has been dampened somewhat by the recent reminder that, for plaintiffs, all is lost if insurance will not cover the conduct of the tortfeasor or the resulting damage. The recent case of *Jacobsen v. Farmers Union Mutual Insurance Company*<sup>21</sup> reflects that ugly fact of life. Jacobsen was driving his vehicle on the four-lane highway near Vaughn, Montana, when he saw a vehicle veer across the center median, cross the highway, and crash in a wheat field. Jacobsen found Keyser in the vehicle bleeding profusely from the head. He tried to control the bleeding until paramedics arrived and

removed Keyser from the vehicle. At that point, Jacobsen saw a gun underneath the body. Keyser died later from what was determined to be suicide by gunshot.

Jacobsen sought counseling for emotional distress from the events and ultimately made claim against his own insurer, Farmers Union Mutual, for benefits under the uninsured and medical pay coverages. (Keyser was uninsured.) The district court granted the insurer summary judgment on the twin grounds that 1) Jacobsen's emotional injuries did not constitute "bodily injury" within the meaning of the UM statute § 33-23-201 or the UM policy agreement, and 2) the emotional distress did not arise from use of an uninsured motor vehicle but from a handgun.

The UM basic insuring agreement contained standard language:

We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle."

The policy's definition of "bodily injury," which is consistent with the statute's, was as follows:

"Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these.

Jacobsen argued that the court's holding in *Treichel*, that Carolyn Treichel's emotional distress at watch-



ing her husband get killed in a bike/car collision was "bodily injury" under the provisions of the State Farm policy, applied in his case. However, the court pointed out that State Farm's policy in *Treichel* did not define bodily injury and that the policy clearly covered such claims as loss of consortium. Further, State Farm was willing to cover emotional injuries but only up to the "one person" limitation in the policy. The *Treichel* court had held that State Farm was simply estopped to deny coverage and found that Carolyn Treichel had suffered an "independent and direct" injury as was deemed compensable in *Sacco*.

In essence, what the court said in *Jacobsen* is that finding a person has suffered an emotional "injury" for purposes of tort law does not mean the emotional injury is "bodily injury" under insurance contract law. The court quoted with approval Farmers Union's assertion that "[t]here is no dispute that Montana tort law allows for recovery of purely emotional damages. However, this case involves the interpretation of contract, and tort law is wholly irrelevant to that interpretation." The court held that "the term 'bodily injury,' as defined in Farmers Union UM policy, is limited to physical injury to a person caused by an accident and does not include emotional and psychological injuries stemming therefrom. Consequently, the court declined to answer whether Keyser's infliction of emotional distress on Jacobsen arose from the use of the auto as opposed to the handgun.

Where the applicable insurance coverage is for "bodily injury," *Jacobsen* makes it imperative that counsel approach development of the claim the way Monte Beck apparently did in *Henricksen*. In reviewing *Henricksen*, the court noted:

In this case, expert medical testimony was introduced at trial which described Kristin's PTSD symptoms. The expert stated this well-recognized mental injury has physical components, including brain chemistry and hormone level alterations. PTSD symptoms

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***Sacco* provides plaintiffs' counsel with a simple and clear remedy for any person who has foreseeably suffered severe or serious emotional distress at the hands of one acting negligently or intentionally.**

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are a response to an emotional trauma that leads to a physical impact upon the brain.

Counsel needs to develop the theory with experts that a manifest mental injury is nothing but a reflection of physical impacts in brain chemistry, hormone levels, and other components of the body's physiology.

Suffice it to say that counsel should always consider the potential unintended (and undesirable) consequences of pleading *intentional* infliction of emotional distress as an intentional tort. While it presents the defendant with a risk of punitive damages, it may allow the tortfeasors' liability insurers off the hook under an intentional acts exclusion or on the ground that the basic coverage agreement only covers "accidents." If feasible and not in violation of Rule 11, counsel may be wise to accompany a count for intentional infliction of emotional distress with one for negligent infliction of emotional distress. Then, under the "four corners" rule, the carrier will likely have to defend and still cope with the potential conflicts injected by the

intentional tort and its punitive damage claim.

If the emotional distress arises from an auto accident and the tortfeasor is uninsured, one can still allege intentional infliction of emotional distress and recover under uninsured motorist coverage. The Montana Supreme Court has held that conduct can be intentional so as to fall outside the tortfeasor's liability coverage and still be "accidental" from the victim's perspective so as to fall within the victim's UM coverage.<sup>22</sup>

### Conclusion

The tort law of emotional distress that developed in Montana came about as a tortured system for getting around harsh common law rules that disallowed emotional distress recovery entirely. *Sacco* provides plaintiffs' counsel with a simple and clear remedy for any person who has foreseeably suffered severe or serious emotional distress at the hands of one acting negligently or intentionally. Bystander's restrictions, requirements for proof of invasion of substantial personal interests, and other requirements of the pre-*Sacco* cases should not hinder counsel anymore. However, if the emotional distress claim cannot be supported by evidence that it is severe or serious, it will lack credibility and may not merit prosecution.

As with all claims, counsel pleading and proving the emotional distress claim must keep one eye on potential insurance coverage. Insurance benefits depend on the language of the insurance coverage, and ultimately recovery may hinge entirely on whether, under the facts of the particular case and the language of the applicable policy, the claimant's emotional distress is a "bodily injury."

## Endnotes

1. 637 P.2d 1175 (1981).
2. *Baker v. Bolton*, 70 Eng. Rep. 1033 (KB 1808).
3. Fatal Accidents Act, 1846, 9&10 Vict. c. 93.
4. *Blake v. Midland Railway Co.*, 118 Eng. Rep. 35, (QB 1852).
5. Prosser, *The Law of Torts*, (4<sup>th</sup> ed. 1971), § 127, pp. 906-907. William Lloyd Prosser, *The Law of Torts*, §127, 906-907 (4<sup>th</sup> ed. West 1971).
6. *Mize v. Rocky Mountain Bell Telephone Co.*, 38 Mont. 521, 100 P. 971 (1909); *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 P. 142 (1909).
7. 441 P.2d 912, (1968).
8. 206 Mont. 313, 671 P.2d 583 (1983).
9. 254 Mont. 178, 835 P.2d 755.
10. 236 Mont. 455, 771 P.2d 114 (1989).
11. 211 Mont. 465, 686 P.2d 209 (1984).
12. 236 Mont. 195, 771 P.2d 84.
13. 271 Mont. 209, 896 P.2d 411.
14. *Rodriguez v. State*, 472 P.2d 509 (1970).
15. §46, comment (j) (1965).
16. *Frigon v. Morrison-Maierle, Inc.*, 233 Mont. 113, 760 P.2d 57 (1988); *Foster v. Albertsons, Inc.*, 254 Mont. 117, 835 P.2d 720 (1992); *Doohan v. Bigfork School Dist.* No. 38, 247 Mont. 125, 805 P.2d 1354 (1991).
17. 223 Mont. 442, 726 P.2d 1153 (1986).
18. 280 Mont. 443, 930 P.2d 661 (1997).
19. 318 Mont. 232, 79 P.3d 1095 (2003).
20. 319 Mont. 307, 84 P.3d 88 (2004).
21. 320 Mont. 375, 87 P.3d 995 (2004).
22. *Wendell v. State Farm Mutual Ins. Co.*, 293 Mont. 140, 974 P.2d 623 (1999). ♦

## Facts About Lawsuits That Tort "Reformers" Ignore

Business cases account for 47% of all punitive damage awards. In contrast, only 4.4% and 2% of punitive damage awards are due to product liability and medical malpractice cases respectively.  
(Rand Institute for Civil Justice, 1996)

## LET'S GET REAL

ARE AMERICANS SUE-HAPPY? YOU BE THE JUDGE.

**Myth #1:** "Americans sue at the drop of a hat."

**Fact:** Very few injured Americans file lawsuits. Only ten percent of injured Americans ever file a claim for compensation, including informal demands and insurance claims, and only two percent file lawsuits. *Compensation for Accidental Injuries in the United States*, Rand Institute for Civil Justice (1991).

**Myth #2:** "More and more tort cases are being filed each year."

**Fact:** Tort lawsuit filings have decreased nine percent since 1992, according to the country's most accurate and comprehensive overview of state court litigation statistics. *Examining the Work of State Courts, 2002*, a joint project of the Conference of State Court Administrators, the Bureau of Justice Statistics and the National Center for State Courts' Court Statistics projects (2003).

**Myth #3:** "Jury verdicts are exploding."

**Fact:** According to data released April 1, 2004, median jury awards in personal injury cases "fell significantly," dropping 30% in 2002 to \$30,000, from nearly \$43,000 in 2001. "Malpractice Awards Remain Flat," *Wall Street Journal*, April 1, 2004. Jury Verdict Research is the source for this statistic, so it is likely the drop is even more significant since JVR data is highly inflated. Also, the top 10 jury verdicts dropped to the lowest total amount since 1997, and the number one verdict was the lowest in a decade. Bill Ibelle, "Top Ten Jury Verdicts Much Smaller in 2003," *Lawyers Weekly USA*.

**Myth #4:** "Civil jury trials are clogging the courts."

**Fact:** The vast majority of tort cases are resolved by neither juries nor judges. In state courts, only five percent of tort cases were disposed of by trial in 2001. *Examining the Work of State Courts, 2002* (2003).

During fiscal years 1996- 1997, a jury or bench trial decided only 3 percent of federal tort cases, meaning that 97 percent of tort cases were not decided by trial. "Federal Tort Trials and Verdicts, 1996-97," NCJ 172855, U.S. Department of Justice, Bureau of Justice Statistics (1999).

**Myth #5:** "The legal system's 'cost to society' is an estimated \$200 billion a year."

**Fact:** This widely-discredited \$200 billion figure is a calculation based on all insurance premiums – even auto insurance for minor fender benders that never come close to a courtroom.

In other words, the figure has nothing to do with lawsuits or the legal system. It also includes the immense costs of operating the incredibly wasteful and inefficient insurance industry. Moreover, most of the costs of the system are the result of corporate wrongdoing causing injury.

More importantly, such numbers fail to factor in the cost savings, particularly to the taxpayer, of compensation and product safety. See Americans for Insurance Reform, "Tillinghast's 'Tort Cost' Figures Vastly Overstate the Cost of the American Legal System (January 2004).

**Myth #6:** "Huge, multi-million-dollar punitive damages awards are routine."

**Fact:** Awards of punitive damages in tort cases are both infrequent and modest in size. According to the most recent data from the Bureau of Justice Statistics of the U.S. Justice Department, punitive damages are imposed in only 3.3 percent of cases, and the median (typical) punitive damages award is \$38,000. "Tort Trials and Verdicts in Large Counties, 1996," U.S. Department of Justice, Bureau of Justice Statistics, NCJ 179769 (August 2000).

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